FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001
(202) 434-9950

September 7, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2011-896 A.C. No. 42-02074-250382
v.	:	
HIDDEN SPLENDOR RESOURCES, INC., Respondent	:	Mine: Horizon Mine

ORDER DENYING RESPONDENT'S MOTION TO COMPEL DISCOVERY

This case is before me upon a Petition for Assessment of Civil Penalty under section 105 (d) of the Federal Mine Act of 1977 ("the Mine Act"), 30 U.S.C. §815(d). On August 25, 2011, Respondent filed its "Motion to Compel Production of SAR FORM." The Secretary refused to provide the Special Assessment Review ("SAR") document invoking the deliberative process privilege. A telephone conference was held by me on September 6, 2011 during which counsel argued the motion. Respondent asserts that although formal discovery had not been engaged in, the SAR would likely contain information that would likely lead to discovery of relevant facts. Specifically, when asked what facts would not otherwise be discoverable through formal discovery not yet engaged in, counsel responded that the conclusions reached by the agency would be contained in the SAR along with contemporaneous recommendations made by officials of the Mine Safety and Health Administration ("MSHA"). For the reasons set forth below, the motion is **DENIED.**

I. The Work Product Privilege

Commission Procedural Rule 1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act. Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another part or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing

that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, in ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of **mental impressions, conclusions, opinions**, or legal theories of an attorney or other representative of a party concerning the litigation.

In *ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990), the Commission discussed the work-product privilege under Rule 26(b)(3), (within which the deliberative process privilege is embodied), stating that the material sought in discovery must be: 1) documents or tangible things, 2) prepared in anticipation of litigation or for trial, and 3) by or for another party or by or for that party's representative. It is not required that the document be prepared by or for an attorney. The burden is on the party seeking to invoke the privilege, to demonstrate the three-part test has been met, however, once that has been satisfied, the burden is then on the party seeking discovery to demonstrate a substantial need and undue hardship to overcome the privilege. *P & B Marina, Ltd Partnership v. Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), aff'd, 983 F.2d 1047m (2d Cir. 992).

The SAR is a document which contains the selected facts pertaining to a cited violation of a health or safety standard along with the mental impressions, conclusions and opinions of MSHA officials used in the determination to categorize the violations as flagrant, and thus enhancing the penalties assessed. While this deliberative process is engaged in at a time when litigation is not pending, it is readily foreseeable that should the special assessment be imposed, the operator is highly likely to contest the penalty. Furthermore, once the enhanced penalty is decided upon, the operator is served with a notice of the proposed penalty and is given 30 days to pay or contest the proposed penalty. 30 C.F.R. §100.7(b). Therefore, this document is prepared in contemplation of litigation and is protected by the work product privilege.

Turning now to whether Hidden Splendor can overcome the privilege by demonstrating a substantial need for the information and an undue hardship if it must obtain the information by other means, Hidden Splendor fails in its attempt to do so. The Respondent has not yet engaged in any formal discovery provided under the Commission rules. They, therefore, cannot at this time, state that interrogatories, requests for admissions, or depositions would fail to provide them with the relevant information pertaining to these violations at issue. Furthermore, as the Respondent stated during the conference call, they seek the "conclusions" and the "contemporaneous recommendations," which are no more than mental impressions of the MSHA officials, contained in this document. As stated above, the court shall protect against the disclosure of mental impressions, conclusions and opinions. For these reasons, I find Hidden Splendor has not overcome the work product privilege.

It is clear to me that the Respondent is not interested in obtaining the facts in support of these violations, but is interested in reaching the inner workings or the deliberative process by which MSHA determines the special assessments. This leads me to the second basis for denial of the Respondent's motion to compel disclosure.

II. **The Deliberative Process Privilege**

The deliberative process privilege was first described by the Commission in *In Re: Contestants of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 990-93 (June 1992)as protecting "the 'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated' (citations omitted). The privilege attaches to inter- and interagency (sic) communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy." *Id*. at 992 (quoting Jordan *v. U.S. Dep't of Justice,* 591 F.2d 753, 772 (D.C. Cir. 1978)). The privilege protects thoughts, ideas, reasoning and analyses which lead to a decision of the agency. *Kan. State Network, Inc. v. F.C.C.*, 720 F.2d 185 (D.C. Cir. 1983).

As already discussed, the Respondent specifically argued that it was the conclusions and contemporaneous recommendations that it seeks through disclosure of the SAR, not the facts. Clearly they are seeking disclosure of the deliberative process involved in the special assessment. Not only are these mental impressions protected by the privilege, but they are also irrelevant in the *de novo* determination by the Administrative Law Judge at hearing.

Respondent further argued that the privilege was not invoked by the head of the agency and is therefore not properly raised here. The Commission, however, permits such assertions through counsel under the delegation of authority. *See Bright Coal Comp.,* 6 FMSHRC 2520 (Nov. 1984).

For the reasons set forth above, the Respondent's Motion to Compel is hereby **DENIED.**

Priscilla M. Rae
Administrative Law Judge

Distribution:

Kristi L. Henes, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202

Brian E. Barner, Esq., Crowell & Morning LLP, 1001 Pennsylvania Ave., N.W., Washington, DC 20004-2595